Filed 12/09/03 In re Jessica O. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

In re JESSICA O. et al., Persons Coming Under the Juvenile Court Law.	
SAN JOAQUIN COUNTY HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. PAUL O., Defendant and Appellant.	C043600 (Super. Ct. No. J02292)

Appellant, the father of Jessica O.[1] and Richard O. (the minors), appeals from the juvenile court's order terminating his

[1] The initial dependency petition listed the minor's name as "Jessica W[.]" However, the social worker later "submitted a name change request" to reflect the minor's name as it appears on her birth certificate.

parental rights. (Welf. & Inst. Code, §§ 366.26, 395.)[2] Appellant contends the procedures used by the juvenile court to appoint him a guardian ad litem violated his right to due process. We agree and, accordingly, shall reverse.

FACTUAL AND PROCEDURAL BACKGROUND

The San Joaquin County Human Services Agency (HSA) filed a dependency petition in January 2001 concerning 16-month-old Jessica, alleging she was at substantial risk of suffering serious harm or illness as a result of the parents' willful or negligent failure to provide her with adequate food, clothing, shelter or medical treatment and their inability to provide her with regular care due to their developmental disabilities. (§ 300, subd. (b).) According to the petition, the parents were receiving supported living services from the regional center, they frequently refused training and assistance, they admitted they would not be able to provide for Jessica's needs, and their home became "increasing[ly] filthy" despite the provision of a month of services. At the detention hearing, counsel was appointed to represent appellant.

At the next court appearance in late January 2001, appellant's attorney requested the appointment of a guardian ad litem for appellant. The mother's attorney made the same

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[2] Further undesignated statutory references are to the Welfare and Institutions Code.

request. Without further colloquy, the juvenile court appointed guardians ad litem for appellant and the mother.

According to the jurisdictional report, the parents denied the allegations in the petition. However, at the jurisdictional hearing in July 2001, the juvenile court sustained the petition with amendments "as noted on the record."

The dispositional report stated that appellant had attended special education classes beginning at an early age. As a teenager, he was placed in a residential program for developmentally disabled children and, subsequently, he graduated from high school. Appellant attended junior college, where he met the minors' mother. He and the mother began receiving supported living services in September 1999, prior to Jessica's birth. Appellant acknowledged "he had severe difficulty reading and writing."

The parents were residing in an adult board and care home because a fire recently destroyed their apartment. The mother was pregnant with another child. The parents acknowledged they had been unable to provide Jessica with consistent care. However, appellant said he "fe[lt] empty" without Jessica and he would comply with the case plan in order to have her returned.

At the dispositional hearing in August 2001, appellant's guardian ad litem submitted on the social worker's recommendations after language was added to the dispositional report indicating that the parents were "now cooperating" with regional center services. The juvenile court adopted the social

worker's dispositional recommendations and ordered reunification services, which were to include counseling, parenting education, regional center services, and visitation.

The mother gave birth to Richard in January 2002. Although there were concerns about the mother's ability to care for Richard, he was left in the parents' care with voluntary family maintenance services from the social services agency and in-home supportive services from the regional center.

The report for the review hearing in February 2002 indicated that appellant was complying with his case plan requirements. He had been attending parenting classes at the Alternative Living Center since November 2001, and attended weekly visits with Jessica. The social worker acknowledged she had not provided the parents with a counseling referral until January 2002.

Appellant's attorney made no argument and took no position at the review hearing in February 2002. The juvenile court adopted the social worker's recommended findings that reasonable services had been provided and that the parents had demonstrated insufficient compliance with the case plan. The court set another review hearing for July 2002.

According to the social worker's report for the following review hearing, Jessica was in good physical and mental health, but she was "25 [percent] delayed in her overall development." Appellant was assigned a therapist in May 2002, but he failed to attend two consecutive sessions in June 2002. Appellant was

receiving in-home parenting classes through the Alternative Living Center, as well as services from the "SPEAK" (Support Program Educating Adults about Kids) program. He was also cooperating with in-home services provided by the regional center. He maintained monthly contact with the social worker and visited the minor. Both parents wanted Jessica returned to their care. However, according to the report, the parents needed to be constantly reminded of "the importance of keeping debris and garbage off the floor . . . ." Despite the progress appellant and the mother had made on their case plans, the social worker recommended termination of reunification services because the parents "continue[d] to have a difficult time maintaining a safe home environment for young children."

In July 2002, a dependency petition was filed concerning Richard, then five months old, alleging that the parents had failed to provide a safe and healthy environment for him as a result of their developmental disabilities. (§ 300, subd. (b).) The petition alleged that the following observations were made on a visit to the parents' home in May 2002: "debris scattered around, such as empty soda containers, and two bowls with leftover cereal on the floor next to their mattress"; a few dishes in the sink and a dirty pan on the stove; two plates in the dining area, one with leftover food; and, "an abundance of soiled diapers in the diaper genie." The petition contained the following allegations concerning the condition of the home during a visit in June 2002: "[t]he living/sleeping area was

cluttered with food debris, clothing (clean and dirty), empty plastic water bottles, dried out formula baby bottles, soiled wrapped diapers, butt[-]filled ashtray and various boxes filled with miscellaneous items." In addition, the home smelled of sour milk and smoke. Finally, the petition alleged that, during a visit in July 2002, there was a pile of dog vomit and empty water bottles in the living area, and the home was hot and stuffy and again smelled of sour milk.

Initially, the juvenile court allowed the parents to retain custody of Richard and ordered them to comply with various services. However, one month later, the juvenile court detained Richard when it was reported that, despite Richard's need to use a nebulizer, appellant continued to smoke in the home. It was also reported that Richard had been observed with a lighter in his mouth. The minor's attorney told the juvenile court that it was a "borderline" dirty home case and that Richard always appeared happy.

A jurisdictional hearing concerning Richard and a review hearing concerning Jessica occurred in October 2002. At the hearing, the attorney for HSA informed the juvenile court that the parents would be submitting on the social worker's recommendations for termination of services with Jessica and jurisdiction as to Richard. Appellant's attorney explained it was anticipated that both minors would be adopted by the same family under an open adoption agreement that would allow the parents to visit the minors and, based on this agreement, the

parents were agreeing not to contest termination of services with Jessica or jurisdiction as to Richard.

Both parents personally waived their trial rights and responded that they understood their parental rights would "be taken away" and the minors placed for adoption. Both parents agreed to have their guardians ad litem enter no contest pleas on their behalf.

Based on this colloquy, the juvenile court found the parents had knowingly and intelligently deferred to their guardians ad litem and that they "understand all these issues." The court set Jessica's matter for a hearing to select and implement a permanent plan pursuant to section 366.26. Richard's matter was continued for a dispositional hearing. The court advised the parents that, if they disagreed with the order terminating services with Jessica, they had a right to file a writ and that they would need to file a notice of intent to file the writ within seven days.

According to the dispositional report concerning Richard, the parents had stopped participating in the Alternative Living Center program and were dropped from their counseling program for failing to attend sessions. The parents had missed Richard's second immunization appointment, and appellant's regional center worker reported that Richard was "in apparent danger while living with his parents." The social worker's recommendation for no reunification services was based on the termination of services with Jessica. (§ 361.5, subd. (b)(10).)

At the dispositional hearing concerning Richard, appellant's attorney informed the juvenile court that they were "prepared to submit on [the] recommendation" for no reunification services. He reiterated that they were "heading toward an . . . open adoption agreement." The juvenile court set Richard's matter for a hearing pursuant to section 366.26 and, again, advised the parents of their right to file a writ if they disagreed with the court's decision.

According to the report for the section 366.26 hearing, the prospective adoptive parents were willing to maintain the minors' relationship with the parents. Attached to the report was a document signed by appellant, the minors' mother, and the prospective adoptive parents entitled "Post Adoption Agreement," which provided for visits with the parents twice a year. The agreement also provided that visits would cease if they became detrimental and if recommended by a therapist.

At the section 366.26 hearing, which occurred in February 2003, appellant's attorney confirmed that he was submitting on the social worker's report. Likewise, appellant's guardian ad litem "submit[ted]." The juvenile court terminated parental rights and ordered a permanent plan of adoption.

DISCUSSION

Appellant claims he was denied due process because the juvenile court failed "to inquire of [him] and advise him properly regarding the appointment of a guardian ad litem

. . . ." We agree that appellant was denied due process when the juvenile court appointed him a guardian ad litem.

"[T]he interest of a parent in the companionship, care, custody and management of his/her children is one of our most basic civil rights. Before the state can deprive a parent of this interest, it must provide the parent with a hearing and an opportunity to be heard." (*In re Sara D.* (2001) 87 Cal.App.4th 661, 668, fn. omitted.)

The appointment of a guardian ad litem "dramatically change[s] the parent's role in [a dependency] proceeding . . . ." (*In re Sara D.*, *supra*, 87 Cal.App.4th at p. 668.) "The effect of the appointment is to remove control over the litigation from the parent, whose vital rights are at issue, and transfer it to the guardian." (*In re Jessica G.* (2001) 93 Cal.App.4th 1180, 1186-1187.) Thereafter, the guardian ad litem, rather than the parent, has the authority to make certain "tactical and even fundamental decisions affecting the litigation . . . ." (*In re Christina B.* (1993) 19 Cal.App.4th 1441, 1454.) "Consequently, the appointment must be approached with care and appreciation of its very significant legal effect." (*In re Jessica G.*, *supra*, 93 Cal.App.4th at p. 1187.) Accordingly, a parent is entitled to due process before a guardian ad litem is appointed on his or her behalf. (*Ibid.*)

In dependency proceedings, a parent's competency is governed by the language of Penal Code section 1367, which states that an individual is mentally incompetent "if, as a

result of mental disorder or developmental disability, the [individual] is unable to understand the nature of the . . . proceedings or to assist counsel in the conduct of a defense in a rational manner." (*In re Christina B.*, *supra*, 19 Cal.App.4th at pp. 1449-1450; cf. *In re Sara D.*, *supra*, 87 Cal.App.4th at p. 667 [finding of incompetency may be based on either Penal Code section 1367 or Probate Code section 1801, which describes persons for whom a conservator may be appointed].) The juvenile court must find by a preponderance of evidence that the parent is incompetent before appointing a guardian ad litem. (*In re Sara D.*, *supra*, at p. 667.)

"If the parent's attorney concludes that a guardian ad litem should be appointed, the attorney must either (a) approach the client and request consent to the appointment, or (b) not consult with the client and approach the court directly. If the attorney consults with the client and receives consent for the appointment of a guardian ad litem, the due process rights of the parent will be protected, since the parent participated in the decision to request the appointment." (*In re Sara D.*, *supra*, 87 Cal.App.4th at p. 668.)

However, if the parent is not consulted or does not consent to the appointment of a guardian ad litem, due process requires that the parent be afforded a hearing before such appointment is made. (*In re Sara D.*, *supra*, 87 Cal.App.4th at pp. 669, 671.) The hearing may be informal but, "[a]t a minimum, the court should make an inquiry sufficient to satisfy it that the parent

is, or is not, competent; i.e., whether the parent understands the nature of the proceedings and can assist the attorney in protecting his/her rights." (*Id.* at pp. 671-672.) "The court or counsel should . . . explain[] to [the parent] the purpose of a guardian ad litem and why the attorney fe[els] one should be appointed. [The parent] should [be] given an opportunity to respond. The court retain[s] the right to exclude all other parties to the action from the courtroom during the hearing. These basic procedures . . . ensure the court does not erroneously deprive the parent of the right to participate in a section 300 proceeding through the appointment of a guardian ad litem." (*Ibid.*)

In the present matter, the only discussion in the record regarding the appointment of a guardian ad litem consisted of the following exchange in court:

"[ATTORNEY FOR APPELLANT]: Could we have a moment, Your Honor?

"THE COURT: Yes. (Pause.)

"THE COURT: Is that Ms. Gonzalez you are talking to? She's from Valley Mountain Regional.

"[ATTORNEY FOR APPELLANT]: Correct. There was another representative here from Valley Mountain Regional. He had to go. He is really dealing with [appellant].

"Your Honor, I request that a guardian ad litem be appointed for [appellant] at this point.

"[ATTORNEY FOR THE MOTHER]: I'm making the same request for the mother, Your Honor. Ms. Gonzalez is the case worker for the mother. I've conferred with her. I believe she agrees.

"THE COURT: Okay.

Without any inquiry of appellant, or any explanation to him of the significance of his attorney's request, the juvenile court appointed a guardian ad litem on appellant's behalf. We agree with appellant that the exchange between his attorney and the juvenile court did not remotely approximate the due process protections that must be in place before a guardian ad litem may be appointed on behalf of a parent in a dependency proceeding. And, contrary to HSA's claim, the fact that there was a pause in the proceedings while appellant's attorney spoke with the mother's regional center representative in no way suggests that appellant was consulted or consented to the appointment of a guardian ad litem.

HSA also contends there was no due process violation because the guardian ad litem was appointed in open court and appellant did not object. Like the appellate court in *In re Sara D.*, *supra*, 87 Cal.App.4th at page 671, we reject this contention because the "minimal proceedings in court occurred so quickly," and with no explanation to appellant as to their significance, "that it is unlikely [he] knew what had occurred until after the fact." (See also *In re Jessica G.*, *supra*, 93 Cal.App.4th at pp. 1189-1190.)

Furthermore, there was scant evidence in the record to support the appointment of a guardian ad litem for appellant. It is true that appellant was a regional center client and had been in special education classes as a child. It is also true he had difficulty reading and writing. This information might support the conclusion that appellant has a developmental disability. (But, cf. *In re Sara D.*, *supra*, 87 Cal.App.4th at p. 674 [questioning admissibility of social worker's reports to establish a parent's incompetency].)

However, contrary to the contention suggested by HSA, a guardian ad litem cannot be appointed based solely on evidence of a parent's developmental disability. There also must be evidence that, as a result of the developmental disability, the parent is unable to understand the nature of the proceedings or to rationally assist his attorney. (Pen. Code, § 1367.) There is no evidence to support this requirement regarding appellant. The nature and extent of appellant's developmental disability is not disclosed by the record. Nor does the record reveal that appellant said or did anything to suggest that he was unable to comprehend the nature of the proceedings or to assist his attorney. Without some inquiry in this regard, there was simply no basis for the juvenile court to appoint a guardian ad litem on appellant's behalf.

Reversal is mandated unless the error in appointing a guardian ad litem for appellant was harmless beyond a reasonable doubt. (*In re Joann E.* (2002) 104 Cal.App.4th 347, 359; *In re*

Sara D., *supra*, 87 Cal.App.4th at p. 673; *In re Jessica G.*, *supra*, 93 Cal.App.4th at p. 1189.) We cannot find the error harmless under this standard of review.

Appellant denied the allegations in the petition concerning Jessica. Those allegations, as well as the allegations in the petition as to Richard, predominantly concerned the dirty condition of the parents' home. As noted by one appellate court, "dirty house case[s]" are less grave on the continuum of problems that might lead to dependency proceedings. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531, fn. 9.) And, here, the minors' attorney referred to the conditions in appellant's home as a "borderline" dirty house case. And, despite a dispositional order in August 2001 that reunification services were to include counseling, appellant was not assigned a counselor until May 2002 -- nine months after Jessica's dispositional hearing and 16 months after dependency proceedings concerning Jessica were initiated. (See § 319, subd. (e) [juvenile court shall order services to be provided as soon as possible whenever it orders a child detained].) Yet, appellant's attorney and guardian ad litem did not challenge either the jurisdictional findings or the findings at review hearings that reasonable services were provided.[3]

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[3] Although the minute order from Jessica's jurisdictional hearing contains a notation "contested re: all," the record on appeal does not reflect that any evidence or witnesses were presented at this hearing. (Capitalization omitted.)

We agree with other appellate courts that it would be improper to "speculate how the imposition of the guardian ad litem as an intermediary may have impeded the flow of information about beneficial witnesses between [appellant] and [his] attorney . . . ." (*In re Joann E.*, *supra*, 104 Cal.App.4th at p. 360; see *In re Sara D.*, *supra*, 87 Cal.App.4th at p. 673; *In re Jessica G.*, *supra*, 93 Cal.App.4th at p. 1189.) In light of the basis for dependency jurisdiction, appellant's denial of the initial allegations and his avowed desire to have Jessica returned to his care, his compliance with many of the services offered throughout much of the proceedings, his consistency with visitation, the failure to assign him a counselor until May 2002, and the failure of his guardian ad litem and his attorney to contest any of the findings or orders in these matters, we conclude the error in appointing a guardian ad litem for appellant cannot be deemed harmless beyond a reasonable doubt.[4]

Finally, HSA claims appellant has waived this issue by failing to raise it on an appeal from the hearing at which the guardian ad litem was appointed. This is incorrect.

The waiver rule balances the interest of parents in the care and custody of their children with that of children in

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[4] We note that "[t]he guardian ad litem's purpose is to protect the rights of the incompetent person" and, therefore, the guardian is not permitted to "compromise fundamental rights, including the right to trial, without some countervailing and significant benefit." (*In re Christina B.*, *supra*, 19 Cal.App.4th at pp. 1453-1454.)

expeditiously resolving their custody status. (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1151-1156.) In most instances, a parent's due process interests are protected despite the application of the waiver rule because the dependency system has numerous safeguards built into it to prevent the erroneous termination of parental rights. (*Id.* at pp. 1154-1155.)

But, the waiver rule will not be applied if "'due process forbids it.'" (*In re S. D.* (2002) 99 Cal.App.4th 1068, 1079, citing *In re Janee J.* (1999) 74 Cal.App.4th 198, 208.) Relaxation of the waiver rule is appropriate when an error "fundamentally undermine[s] the statutory scheme so that a parent would have been kept from availing himself or herself of the protections afforded by the scheme as a whole." (*In re Janee J.*, *supra*, at p. 208.) Appellate courts have refused to apply the waiver rule when a guardian ad litem has been appointed erroneously, because in such cases the attorney looks to the guardian ad litem, not the parent, to exercise the right to appellate review. (*In re Joann E.*, *supra*, 104 Cal.App.4th at pp. 353-354; *In re Jessica G.*, *supra*, 93 Cal.App.4th at p. 1190.)

We conclude it would be inappropriate to apply the waiver rule here. The guardian ad litem was appointed prior to the jurisdictional hearing. Appellant was not advised by the court, either at that time or at the subsequent jurisdictional and dispositional hearings that he had a right to appeal following the dispositional hearing. Appellant's guardian ad litem failed

to contest any of the findings and orders that eventually resulted in the termination of appellant's parental rights. In addition, a judge who had recused himself early in the proceedings nonetheless presided at numerous critical hearings.[5] At one of the hearings, the judge indicated he was willing to preside despite his recusal because there was an agreement as to what would occur. At other hearings, the attorneys either purported to "waive" the conflict of interest or no mention was made at all of the judge's prior recusal in the matter.[6] Thus, many of the safeguards normally in place in dependency proceedings, such as a parent's right to contested hearings and to independent judicial review concerning crucial findings and orders, were compromised at key hearings in this matter.

In a related argument, HSA claims that, by signing the post-adoption agreement, appellant manifested his consent to the termination of his parental rights. The same argument could be made regarding the hearing at which the court found jurisdiction as to Richard and set Jessica's matter for a section 366.26

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[5] The judge who had recused himself presided at the six-month review in February 2002; the jurisdictional hearing regarding Richard, at which services with Jessica were terminated; the dispositional hearing regarding Richard, at which reunification services were denied; and the section 366.26 hearing, at which parental rights were terminated.

[6] Although not raised by the parties, we question the authority of a judge who has recused himself or herself to make substantive rulings in a dependency matter, even if the conflict of interest is waived by all parties. (See Code Civ. Proc., § 170.4.)

hearing, because appellant personally waived his trial rights at the hearing after being advised that this would most likely result in the minors being adopted. However, we are not persuaded that these actions constituted a waiver of the issue on appeal.

These hearings occurred more than one and one-half years after dependency proceedings were commenced and a guardian ad litem was appointed. Many of the protections normally afforded a parent by the dependency scheme had repeatedly been forfeited or neglected by this point in the proceedings. It is certainly conceivable that, by this point, appellant believed his only hope for a future relationship with his children was to accept an open adoption agreement with the attendant termination of his parental rights. Consequently, we are unconvinced that the taint from the erroneous appointment of a guardian ad litem early in the proceedings was sufficiently attenuated so as not to have infected these later proceedings.

The error in this matter necessitates that the proceedings return to "square one," as appointment of the guardian ad litem occurred before the jurisdictional hearing. On remand, the juvenile court must determine whether there is a current basis for jurisdiction. (*In re S. D.*, *supra*, 99 Cal.App.4th at pp. 1083-1084.) We share in the sentiments expressed by other appellate courts when faced with the prospect that a decision in a dependency appeal will greatly prolong the attainment of stability and permanence for the children involved. (See, e.g.,

In re Joann E., *supra*, 104 Cal.App.4th at p. 361.) Nonetheless, under the circumstances presented here, we are compelled to ensure that appellant is afforded the due process protections to which he is entitled before his parental rights are forever lost.[7]

DISPOSITION

The juvenile court's appointment of a guardian ad litem for appellant and all subsequent orders are vacated. The matter is remanded to the juvenile court with directions to conduct a new jurisdictional hearing consistent with the opinion herein.

BLEASE, Acting P. J.

We concur:

RAYE, J.

ROBIE, J.

[7] As the termination of parental rights is vacated based on the erroneous appointment of a guardian ad litem for appellant, we find it unnecessary to reach appellant's argument that the juvenile court erred by accepting a submission from the guardian ad litem at the section 366.26 hearing.